Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-110

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

GEORGE EDWARD MARTIN - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions	2
Statement of the Case	3– 5
Statement of the Facts	5– 9
Reasons for Granting the Writ	10–12
Conclusion	13
Proof of Service	14
Appendix	15–19
Opinion of the Court of Appeals of Kentucky	15–18
Mandate of the Court of Appeals of Kentucky	19

TABLE OF CASES AND AUTHORITIES

Cases: PAGE

Kentucky v. Harold Whorton, 441 U. S. ____ (1979) 4, 5, 12, 13

Taylor v. Kentucky, 436 U. S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) 2, 3, 10, 11, 12

Whorton v. Commonwealth, Ky., 570 S. W. 2d 627 (1978) 2, 3, 4, 5, 10, 11

Miscellaneous:

Fourteenth Amendment, United States Constitution 2

28 USC §1257(3) 2

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

GEORGE EDWARD MARTIN - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, the Commonwealth of Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky reversing the conviction of the respondent in the Jefferson Circuit Court at Louisville, Jefferson County, Kentucky.

OPINION BELOW

The Trial Court rendered no written opinion in this case. An Opinion (not to be published) was rendered by the Kentucky Court of Appeals on September 15, 1978. It is printed in the appendix to this petition beginning at page 15. The Mandate of the Court of Appeals of Kentucky denying the petitioner's Petition for Rehearing and Modification, and petitioner's Motion for Discretionary Review by the Kentucky Supreme Court appears in the appendix at page 19.

JURISDICTION

The Judgment of the Court of Appeals of Kentucky was entered on September 15, 1978. A timely Petition for Rehearing and Modification was denied by that Court on February 2, 1979. Petitioner's timely Motion for Discretionary Review by the Kentucky Supreme Court was denied April 24, 1979. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

QUESTION PRESENTED

Whether The Court of Appeals of Kentucky Erred in Applying to this Case the Kentucky Supreme Court's Decision in *Whorton* v. *Commonwealth*, Ky., 570 S. W. 2d 627 (1978), Which Misinterpreted the Scope and Effect of this Court's Decision in *Taylor* v. *Kentucky*, 436 U. S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This suit was instituted upon the indictment of George Edward Martin by the Jefferson County Grand Jury, Jefferson County, Kentucky, for the offenses of burglary in the second degree, possession of burglar's tools, and as being a first degree persistent felon. Martin was convicted by a jury of his peers on the first two counts of the indictment and sentenced to imprisonment of five (5) years for second degree burglary, and to twelve (12) months in the county jail for possession of burglar's tools. In a bifurcated proceeding the jury found Martin to be a persistent felony offender and his sentence on the principal charge was enhanced and fixed at fifteen (15) years imprisonment.

Martin appealed his conviction to the Court of Appeals of Kentucky which reversed the final judgment of the trial court on September 15, 1978, because that court had refused respondent's request to instruct the jury on the presumption of innocence. The Kentucky Court of Appeals relied upon *Whorton* v. *Commonwealth*, Ky., 570 S. W. 2d 627 (1978), wherein the Supreme Court of Kentucky interpreted this Court's decision in *Taylor* v. *Kentucky*, 436 U. S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978), to mean that error of constitutional proportions requiring automatic reversal occurs whenever a requested instruction on the presumption of innocence is rejected.

The petitioner thereupon timely filed a Petition for Rehearing and Modification in the Kentucky Court of Appeals urging that *Taylor* v. *Kentucky* was limited to

its own facts and did not, as *Whorton* had held, require automatic reversal of criminal convictions when a requested instruction on the presumption of innocence was rejected regardless of the factual circumstances. Petitioner requested that the Court of Appeals grant the Petition for Rehearing and Modification, or in the alternative, withhold its decision and mandate until such time as the Kentucky Supreme Court ruled on a similar petition regarding *Whorton*. By order entered November 21, 1978, the Court of Appeals agreed to hold petitioner's Petition for Rehearing in abeyance until this Court acted on the Petition for Writ of Certiorari by that time filed in *Whorton*. However, that order was withdrawn on February 2, 1979, and petitioner's Petition for Rehearing and Modification denied.

Petitioner then filed a Motion for Discretionary Review of the decision of the Kentucky Court of Appeals in the Supreme Court of Kentucky. This motion was denied by that Court on April 24, 1979. The mandate of the Court of Appeals issued three days later.

Petitioner thereafter requested the Kentucky Court of Appeals to stay the execution and enforcement of its mandate for a period of ninety (90) days from April 24, 1979, the date of the Kentucky Supreme Court's order denying the Commonwealth's Motion for Discretionary Review, so that it might petition this Court for a Writ of Certiorari. This motion was denied on May 11, 1979.

On May 21, 1979, this Court delivered a Per Curiam Opinion in *Commonwealth of Kentucky* v. *Harold Whorton,* 441 U. S. —— (1979), which reversed and

remanded that case to the Kentucky Supreme Court for further proceedings not inconsistent with its Opinion.

On June 4, 1979, petitioner filed a Motion to Recall the Mandate and to Reconsider the Denial of the Commonwealth's Petition for Rehearing and Modification in the Kentucky Court of Appeals. Petitioner urged that Court to reassume jurisdiction in this case in light of this Court's Opinion reversing the Kentucky Supreme Court in *Whorton*. This motion was denied on June 25, 1979.

On July 3, 1979, Petitioner filed a second Motion for Discretionary Review in the Kentucky Supreme Court, requesting that Court to review the decision of Kentucky Court of Appeals based upon this Court's reversal in *Whorton*. To date no decision has been made on this motion. However such a motion is extraordinary and is without procedural precedent. Petitioner's only real alternative is a Petition for Writ of Certiorari to this Court.

STATEMENT OF THE FACTS

On May 27, 1977, the Jefferson County Grand Jury returned a multi-count indictment against George Edward Martin, and a co-defendant, Paul Edwin Breeding, charging both with second degree burglary and possession of burglary tools, the respondent with being a first degree persistent felon, and Breeding with resisting arrest and third degree assault. Martin's trial, at which he entered a plea of not guilty, was conducted on October 12, 1977.

Sergeant John Lewis of the Shively Police Department testified that at approximately 2:56 a.m. on April 19, 1977, he, Lt. Milner, and Officers Klain and Pate were dispatched to 3608 South Seventh Street, the location of Mugsey's Speakeasy, where a reported break-in was in progress. Each of the officers arrived at the scene approximately two minutes thereafter. Officer Pate was stationed at the front of the establishment, while Milner, Lewis and Klain proceeded to the rear where they met a Mr. Lane, the individual reporting the break-in.

Sergeant Lewis testified further that Mr. Lane informed them that he had heard what sounded like machines being forced open inside the tavern, had heard change rattling, and had seen two sets of legs through on opening in the wall where the air conditioner sat. An inspection of the outside of the tavern indicated its perimeter was secure and that its doors were locked. It was then that the officers noticed that the air conditioning unit at the rear of the building appeared as if it had been moved.

Sergeant Lewis and Officer Pate pushed the unit into the tavern, and having entered, conducted a quick search of the premises. That search revealed that a desk and cabinet in the office area of the bar, and the tavern's pinball machines had been forced open. Upon a more thorough search Paul Breeding was discovered hiding beneath a blanket under a performing stage at the rear of the bar. Breeding was coaxed from his hiding place and ordered to turn and face the wall. As he began to do so he quickly swung around and grabbed

Lt. Milner's service revolver. Trying to wrest the pistol from Milner he kneed Milner in the groin. At this point Sergeant Lewis struck Breeding with his flashlight driving him to the floor. Lewis noted Lt. Milner was in a great deal of pain at that time and was unable to assist him and Officer Pate.

Officer Klain was then summoned into the building by Sergeant Lewis to assist in seraching for the second suspect. In that search George Martin was found hiding behind another stage pretending to be asleep. When "awakened" by Lewis, Martin stated that he had been asleep since 9:00 p.m.

Both Martin and Breeding were thereupon informed of their rights and questioned. Breeding informed the officers where the money they had taken was hidden, after which he and Martin were transported to police headquarters. Lewis noted that Martin asked to be given a break because he needed money to pay his attorney. Sergeant Lewis also noted that a hammer, flashlight, screwdrivers, pliers, vice grips, and a tire tool were found at the scene. Lewis stated that the amount of money taken in the burglary was $103.75, and that in his opinion Martin was not intoxicated at the time of his arrest.

Roger Jackson, the owner of Mugsey's Speakeasy, testified that he closed the tavern at approximately 1 a.m. on the morning of the burglary. When informed of the break-in he drove to the bar just as the police discovered Martin. Johnson noted that Martin had worked for him on occasion in the past but was not an

employee at the time of this offense. He added that Martin did not have permission to be in the tavern.

Officer Klain confirmed Lewis' testimony, noting that he had participated in Martin's arrest. It was his opinion that Martin was not intoxicated when arrested. Klain also noted that Martin stated he broke into the tavern to obtain money to pay his attorney.

Lt. Milner, who was in charge of the officers investigating the burglary, confirmed that Breeding struck him several times in the groin with his right knee in a struggle for his service revolver. Due to this assault he was driven to his knees by pain and lost partial control of his weapon.

On behalf of the defense, George Michael Fitz testified that he saw Martin at the Tim Tam Water Hole at 10 p.m. on the evening of April 18th and noted him to be extremely intoxicated. Fitz stated Martin left the bar alone about 11 p.m. He estimated the Tim Tam was approximately ten miles from Mugsey's Speakeasy.

Paul Moser, operator of the Tim Tam, stated he refused to serve Martin because he appeared to be on drugs. Moser noted Martin arrived at 10 p.m. and left around 11 p.m., and that he did not see him drink anything while at the bar.

Paul Breeding stated he met Martin about 11 a.m. on April 18th, and that they began to drink and play pool. At one bar Martin introduced Breeding to a man named John. Breeding stated that John had some drugs and "we got a little messed up." Martin left Breeding at another bar at approximately 7 p.m. and returned for him around 1 a.m.

Breeding admitted he assisted Martin in breaking into Mugsey's Speakeasy. He noted they found the tools used to break into the machines inside the bar. While doing so Breeding stated he heard the police approach and found a place for Martin and him to hide.

On cross-examination Breeding denied causing any pain to any of the police officers investigating the burglary. Instead he claimed that when the police found him he was beaten, and that Martin was struck in the jaw with a shotgun and kicked by the officers.

Martin, testifying in his own defense, stated that he remembered nothing from the time he left Breeding around 7 p.m. until he awoke in jail the following morning.

The court instructed the jury upon the offenses of second degree burglary and possession of burglar's tools, intoxication, reasonable doubt, and the necessity for a unanimous verdict. After an hour of deliberations the jury returned its verdict finding Martin guilty of both second degree burglary and possession of burglar's tools, and recommended sentences of five years imprisonment and twelve months in the county jail respectively. The jury was polled upon request of counsel, and each juror affirmed his verdict.

In a bifurcated proceeding Martin was convicted as a persistent felon and his punishment on the principal charge enhanced to fifteen years' imprisonment. Final judgment was entered on October 24, 1977.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Kentucky erred in applying to this case the Kentucky Supreme Court's Opinion in *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978), which misinterpreted the scope and effect of this Court's decision in *Taylor* v. *Kentucky,* 436 U. S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). In *Whorton* v. *Commonwealth* the Kentucky Supreme Court interpreted *Taylor* v. *Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error." (570 S. W. 2d at 633). This interpretation of *Taylor* v. *Kentucky* therefore required automatic reversal in every criminal case where a request for such an instruction was denied regardless of the circumstances of the case.

It has been the petitioner's position that the decision in *Taylor* v. *Kentucky* did not create any newly declared constitutional requirement that a rejected instruction on the presumption of innocence requires automatic reversal of a state conviction. To the contrary, it appeared quite clear that the Opinion in *Taylor* v. *Kentucky* was limited to its own facts and conspicuously avoided creating any constitutional requirement mandating that state courts instruct on the presumption of innocence. Thus the holding in *Whorton,* that the failure to give a requested instruction on the presumption of innocence required automatic reversal on federal due process grounds, was based upon a faulty premise.

In addressing this issue in its Per Curiam Opinion rendered May 21, 1979, in *Kentucky* v. *Harold Whorton,* 441 U. S. —— (1979), this Court stated in pertinent part:

> . . . the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor,* such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors — to determine whether the defendant received a constitutionally fair trial.
>
> The Kentucky Supreme Court thus erred in interpreting *Taylor* to hold that the Due Process Clause of the Fourteenth Amendment absolutely requires that an instruction on the presumption of innocense be given in every criminal case. 441 U. S. at ——. (Slip Opinion at 4).

The judgment of the Kentucky Supreme Court in *Whorton* was *vacated* and the case *remanded* for further consideration in light of this decision.*

In the case at bar the evidence presented by the prosecution was far more substantial than that pre-

*On June 4, 1979, this Court *granted* petitioner's Petition for a Writ of Certiorari in the following cases, and *vacated* and *remanded* these cases to the Supreme Court of Kentucky for further consideration in light of *Kentucky* v. *Whorton, supra*: *Kentucky* v. *Barry Vaughn Williams,* No. 78-1085; *Kentucky* v. *James Ronald Avery,* No. 78-1084; *Kentucky* v. *Ralph Brannon,* No. 78-750; *Kentucky* v. *Edgar Gilbert Miller,* No. 78-1493. A similar petition presently pending before this Court is *Kentucky* v. *Stanley Ray Simpson,* No. 78-1676.

sented in *Taylor* v. *Kentucky*. No challenge was entered relative to the arguments of counsel. No harmful inferences were made with respect to the indictments. There were no suggestions made in this case that respondent's mere status as a defendant would in itself tend to establish guilt—unlike *Taylor* v. *Kentucky*. Finally, the totality of the evidence in this case, unlike *Taylor*, cannot be described as a mere swearing contest—the evidence of guilt was overwhelming.

Perusal of the decision of this Court in *Taylor* v. *Kentucky* indicated that that decision turned solely upon its unique and unusual facts. The numerous extraneous circumstances which occurred during the trial in the *Taylor* case were specifically noted by this Court, and when they were *considered together*, established the basis for the violation of Taylor's constitutional rights. The petitioner maintains, and this Court's decision in *Kentucky* v. *Whorton* supports the position, that absent such similar factual circumstances during trial no such constitutional violation would occur. As just previously noted the circumstances of this case are not at all similar to those in *Taylor* v. *Kentucky*. Therefore, this case should have been considered on its own facts and circumstances and not automatically reversed because the trial court refused to give the requested instruction on the presumption of innocence.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this Court should grant a writ of certiorari in this case based upon its decision in *Kentucky* v. *Whorton*, 441 U. S. —— (1979), vacate the judgment, and remand this action to the Kentucky Court of Appeals.

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for the Petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 20 day of July, 1979, to Hon. Terrence R. Fitzgerald, Chief Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson Street, Louisville, Kentucky 40202; and Hon. Daniel T. Goyette, Deputy Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson Street, Louisville, Kentucky 40202, Counsel for Respondent.

Patrick B. Kimberlin III

PATRICK B. KIMBERLIN, III
Assistant Attorney General

APPENDIX

OPINION RENDERED: September 15, 1978
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

78-CA-318-MR

GEORGE EDWARD MARTIN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Indictment No. 159150

REVERSING

* * * * * * *

BEFORE: MARTIN, Chief Judge, REYNOLDS, and WILHOIT, Judges.

WILHOIT, Judge. This is an appeal from a judgment of the Jefferson Circuit Court entered in accord with a jury verdict finding George Edward Martin guilty of second-degree burglary (KRS 511.030), for which he was sentenced to confinement in the penitentiary for 5 years, and possession of burglary tools (KRS 511.050), for which he was sentenced to confinement in the county jail for 12 months. In a separate proceeding, as required by KRS 532.080, it was determined that Martin was a persistent felony offender and his sentence was fixed at 15 years imprisonment.

Martin and his co-defendant, Paul E. Breeding, were apprehended by police at 3:00 a.m. on April 19, 1977, inside Mugsy's Speakeasy, Louisville, Kentucky, which they had entered through an opening made by pushing an air con-

ditioning unit away from the wall. Both men were found hiding in different areas of the building. Various pinball machines had been broken into and burglary tools and money from the machines were recovered. According to testimony by the arresting officers, Breeding grabbed the gun held by one of the officers and kneed him in the groin before another officer subdued him by hitting him over the head with a flashlight. Breeding, testifying for Martin, stated that he was beaten by the officers as he came out of his hiding place on his hand and knees, and that he did not know what they used to beat him but that an injury to his head required stitches. Breeding further testified that when they found Martin they struck him in the jaw with a shotgun and kicked him in the ribs. Breeding admitted that he was guilty of burglary but said that he did not try to flee and that he did not cause physical injury to anyone.

Martin testified that he was under the influence of various intoxicants and that he could remember nothing that occurred from some time before the burglary until he woke up in jail the next morning. Other defense witnesses also testified that Martin appeared to be intoxicated that evening.

Martin argues that the trial court committed the following reversible errors: 1) refusal to instruct on third-degree burglary, 2) improper instruction on reasonable doubt, and 3) refusal to instruct on the presumption of innocence. We agree that the third error requires that this case be reversed.

At the close of the evidence, counsel for Martin tendered the following instruction relative to presumption of innocence:

> The defendant is presumed to be innocent of the offense charged. The burden is upon the prosecution to prove his guilt to you beyond a reasonable doubt, and you may consider nothing but legal and credible evidence introduced in this trial to support any charge against him. This burden of proof never shifts to the defendant. He has no burden or duty whatsoever to prove his innocence. His innocence is presumed, and this presumption of innocence is sufficient to acquit the defendant unless you are satisfied that the prosecution has proved each and every element of the offense charged beyond a reasonable doubt. If you are not satisfied that the prosecution has proved any single element of the offense charged beyond a reasonable doubt, you must find the defendant not guilty.

Subsequent to the filing of the briefs in this case, the United States Supreme Court decided the case of *Taylor* v. *Kentucky*, ____ U. S. ____, 98 S. Ct. 1930 (1978), holding that on the facts of that case the trial court's refusal to give a requested instruction on the presumption of innocence resulted in a violation of the defendant's right to a fair trial as guaranteed by the Due Process clause of the fourteenth amendment. Our Supreme Court has interpreted *Taylor* to stand for the proposition that reversible error occurs whenever an instruction on presumption of innocence is asked for and denied by the trial court. *Whorton* v. *Commonwealth*, Ky., ____ S. W. 2d ____, 25 Ky. L. Summ. 10 (July 25, 1978). The trial court reversibly erred, therefore, in refusing to instruct on the presumption of innocence.

It is unnecessary to determine whether the trial court gave an erroneous reasonable doubt instruction. This issue will not arise on retrial since our Rules of Criminal Procedure have recently been amended to provide that the instructions should not attempt to define reasonable doubt. RCr 9.56(2).

Martin argues that the court should also have instructed on third-degree burglary in light of Breeding's testimony that he did not cause injury to anyone. Third-degree burg-

lary differs from second-degree burglary in that there is no requirement that physical injury be caused. If the evidence is the same on retrial, Martin is entitled to an instruction on third-degree burglary.

The judgment of the trial court is reversed with directions for a new trial.

ALL CONCUR.

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COURT OF APPEALS OF KENTUCKY

File No. 78-CA-318-MR

GEORGE EDWARD MARTIN

v.

COMMONWEALTH OF KENTUCKY

Appeal from Jefferson Circuit Court
Action No. 159150

OPINION—Rendered September 15, 1978

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It is therefore the mandate of this Court that its ruling, as set forth in the opinion, now be carried out.

February 2, 1979—Appellee's Petition for Rehearing Denied.

April 24, 1979—Movant's Motion for Discretionary Review by Supreme Court Denied.

A Copy—Attest:
Issued April 27, 1979

(s) John C. Scott, Clerk